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EXAMINER BRIEF

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U.S. Application Serial No. 88757432

Mark: 5 DAY FASTING DIET

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Reference/Docket No. L9299-5231

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EXAMINING ATTORNEY'S APPEAL BRIEF

INTRODUCTION

Applicant has appealed the trademark examining attorney's final refusal to register the mark 5 DAY FASTING DIET used in connection with prepared meals for medical use, meal replacement drinks, soups, and snacks, pursuant to Section 2(e)(1) of the Trademark Act, 15 U.S.C. §1052(e)(1), and the requirement for information. This appeal follows.

ISSUE ON APPEAL

Whether applicant's mark 5 DAY FASTING DIET is merely descriptive for prepared meals for medical use and meal replacement drinks, soups, and snacks.

PROCEDURAL HISTORY

On January 16, 2020, applicant filed its application to register the mark 5 DAY FASTING DIET for “Nutritionally balanced prepared meals for medical use consisting primarily of grains, nuts and vegetables; nutritional meal replacement drinks, soups and snacks adapted for medical use; herbal teas for medical treatments; dietary supplements; food supplements; nutritional supplements; vitamin and mineral supplements; plant-based supplements containing algal oil, vegetable powders, and vitamins and minerals” in Class 5. On February 5, 2020, applicant was refused registration pursuant to Sections 2(d) of the Trademark Act for a likelihood of confusion with a registered mark, 2(e)(1) of the Trademark Act for being merely descriptive for the goods, and applicant was also required to respond to a request for information about the goods. On August 8, 2020, applicant responded, amended the identification to delete several items, argued against the refusals, and provided some information in response to the request. On September 8, 2020, registration was finally refused pursuant to Sections 2(d) and 2(e)(1), and the information requirement was also made final.¹ On March 8, 2021, applicant filed a request for reconsideration, as well as an appeal, and a denial of the request for reconsideration was issued on April 1, 2021. The request for reconsideration amended the identification of goods to “Nutritionally balanced prepared meals for medical use consisting primarily of grains, nuts and vegetables, sold to the consumer only after a medical consultation with a doctor or other medical personnel, or upon the completion of a

¹ Applicant's appeal brief provided acceptable answers to the request for information. Applicant's Brief, 6 TTABVue 19-21. As a result, this requirement has been satisfied. *See* TMEP §§ 713.02, 714.04; TBMP § 1205.01(b)(2).

medical questionnaire; nutritional meal replacement drinks, soups and snacks adapted for medical use, sold to the consumer only after a medical consultation with a doctor or other medical personnel, or upon the completion of a medical questionnaire.” The denial of the request for reconsideration advised that the Section 2(d) refusal was obviated.

ARGUMENT

**THE APPLIED-FOR MARK, 5 DAY FASTING DIET, IS MERELY DESCRIPTIVE OF A
CHARACTERISTIC, FEATURE AND USE OF THE IDENTIFIED GOODS, AND REGISTRATION
MUST THEREFORE BE REFUSED UNDER SECTION 2(e)(1) OF THE TRADEMARK ACT, 15
U.S.C. §1052(e)(1)**

A mark is merely descriptive if it describes a characteristic, feature or use of an applicant’s goods. TMEP §1209.01(b); *see, e.g., In re TriVita, Inc.*, 783 F.3d 872, 874, 114 USPQ2d 1574, 1575 (Fed. Cir. 2015) (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 1173, 71 USPQ2d 1370, 1371 (Fed. Cir. 2004)); *In re Steelbuilding.com*, 415 F.3d 1293, 1297, 75 USPQ2d 1420, 1421 (Fed. Cir. 2005) (citing *Estate of P.D. Beckwith, Inc. v. Comm’r of Patents*, 252 U.S. 538, 543 (1920)). The determination of whether a mark is merely descriptive is made in relation to an applicant’s goods, not in the abstract. *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 1254, 103 USPQ2d 1753, 1757

(Fed. Cir. 2012); *In re The Chamber of Commerce of the U.S.*, 675 F.3d 1297, 1300, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012); TMEP §1209.01(b).

The descriptiveness of a mark in an intent-to-use application must be determined by the goods or services identified in the application. *See Octocom Sys. Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787-88 (Fed. Cir. 1990); *In re Vehicle Identification Network, Inc.*, 32 USPQ2d 1542, 1544 (TTAB 1994). Whether a mark is merely descriptive is “evaluated ‘in relation to the particular goods for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use.’” *Chamber of Commerce*, 102 USPQ2d at 18. The proposed mark need not describe a feature or attribute of all goods in the application for the refusal to be affirmed. “If a mark is descriptive of any of the [goods] in a class for which registration is sought, it is proper to refuse registration as to the entire class.” *Chamber of Commerce*, 102 USPQ2d at 1219; *see also In re Stereotaxis, Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005); *In re Dolce Vita Footwear, Inc.*, 2021 USPQ2d 479, at *5 n.8. (TTAB 2021), Serial No. 88171365 - 8-1219 (quoting *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007)), and “not in the abstract or on the basis of guesswork.” *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)). The inquiry is “whether someone who knows what the goods and services are will understand the mark to convey information about them.” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018) (quoting *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (internal quotation omitted)). A mark is suggestive rather than merely descriptive if it requires imagination, thought, and perception on the part of someone who knows what the goods are to reach a conclusion about their nature from the mark. *See, e.g., Fat Boys*, 118 USPQ2d at 1515.

In this case, the applied-for mark is 5 DAY FASTING DIET for “Nutritionally balanced prepared meals for medical use consisting primarily of grains, nuts and vegetables, sold to the consumer only after a medical consultation with a doctor or other medical personnel, or upon the completion of a medical questionnaire; nutritional meal replacement drinks, soups and snacks adapted for medical use, sold to the consumer only after a medical consultation with a doctor or other medical personnel, or upon the completion of a medical questionnaire.”

In evaluating the mark, the proper consideration is “the commercial impression of a mark as a whole.” *Real Foods*, 128 USPQ2d at 1374 (quoting *DuoProSS*, 103 USPQ2d at 1757 (citation omitted)). “In considering [a] mark as a whole, [we] ‘may not dissect the mark into isolated elements,’ without ‘consider[ing] . . . the entire mark,’” *id.* (quoting *DuoProSS*, 103 USPQ2d at 1757), but we “may weigh the individual components of the mark to determine the overall impression or the descriptiveness of the mark and its various components.” *Id.* (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004)). Indeed, the evaluating party is “required to examine the meaning of each component individually, and then determine whether the mark as a whole is merely descriptive.” *DuoProSS*, 103 USPQ2d at 1758. The elements of the mark, as well as the composite as a whole, are descriptive of a characteristic, feature or use of Applicant’s goods, as explained below.

A. The term “5 DAY” is descriptive of a characteristic, feature or use of applicant’s goods because the goods are used over a five day period.

The term “day” is defined as “A period of twenty-four hours as a unit of time, reckoned from one midnight to the next, corresponding to a rotation of the earth on its axis.” Office Action dated 2/05/2020, TSDR 106. This type of wording is commonly used to describe a feature or characteristic of certain diets, wherein the goods are consumed over a certain number of days during the fasting, or

calorie restriction, as shown by the evidence attached to the February 5 and September 8, 2020 Office Actions. See www.sciencemag.com (article titled “*Five-day Fasting Diet Could Fight Disease, Slow Aging*” discusses fasting diet that lasts five days), www.newsweek.com (article titled “*Could a Five-Day Fasting Diet Prolong Your Life?*” discusses a five day fasting diet wherein the user restricts calories and takes supplements), www.womanandhome.com (article titled “*The Alternate Day Fasting Diet*” discusses a five and two day fasting diet plan: “Some alternate day fasting diets suggest two days of fasting a week instead (the 5:2 day fasting diet, for example), and ‘fasting’ can mean anything from total abstinence to half of your recommended daily intake”), www.food.ndtv.com (“The fasting diet, otherwise known as the 5:2 because of the format - *five days* of normal eating a week and two in which you restrict your calories (500kcal for women, 600kcal for men)”; TSDR 108-129. The wording “5 DAY” merely describes a feature, characteristic or use of the goods because they are meant to be consumed over a five day period. Applicant’s response has confirmed this descriptive meaning. See Applicant’s Brief 6 TTABVue 21 (“Yes. The Applicant’s goods are meant to be used in 5-day increments.”) As a result, the “5 DAY” portion of the mark is merely descriptive.

B. The term “FASTING” is descriptive of a characteristic, feature or use of applicant’s goods because the goods are meant to be consumed as part of a fasting, or restricted calorie, diet while only using the applicant’s goods.

The term “fasting” is the gerund form of the verb “fast,” which means “to eat sparingly or abstain from some foods.” Office Action dated 2/05/2020, TSDR 5, 19. Within the relevant industry of dieting and/or food nutrition, this wording is commonly used to describe a particular type of diet known as fasting diets, or restricted calorie diets, as shown by the evidence from www.healthline.com (article titled “The Beginner’s Guide to the 5:2 Diet” discusses an intermittent fasting diet wherein the user restricts caloric intake as part of the diet: “The 5:2 diet, also known as The *Fast Diet*, is currently the most popular intermittent *fasting diet* . . . It’s called the 5:2 diet because five days of the week are

normal eating days, while the other two *restrict calories* to 500–600 per day”); www.medicalnewstoday.com (article titled “What to know about the 500-calorie diet” discusses a restricted calorie diet and other forms of intermittent fasting diets); www.sciencemag.com (article titled “*Five Day Fasting Diet* Could Fight Disease, Slow Aging” discusses fasting diets: “Previous studies in rodents and humans have suggested that *periodic fasting* can reduce body fat, cut insulin levels, and provide other health benefits”; “One of the best known programs, the 5:2 diet, allows you to eat normally for 5 days a week. On each of the other 2 days, you *restrict yourself to 500 to 600 calories*”); www.newsweek.com (article titled “Could A 5-Day Fasting Diet Prolong Your Life” discusses fasting diets), 2/05/2020 Office Action, TSDR 66-71; 85-86; 108-110; 112-113; www.medicinenet.com (article titled “*Fasting Diets*” discusses various types of fasting diets: “*Fasting* for health and to lose weight is also nothing new, but a new crop of trendy diets has brought the practice back into the spotlight. Diets like the 5:2 Diet, Lemonade Diet, and others claim to help people lose weight fast and detoxify the body. There are different types of *fasting diets* that vary in intensity and duration. There are water-only fasts (typically done under medical supervision in residential facilities). Intermittent *fasting* involves *fasting* for one to two days per week or for 12-14 hours each day. Modified fasts include liquid-only diets (such as before a colonoscopy), *caloric restriction* (typically 20%-40% less), and ketogenic diets (a high-fat diet that induces the same metabolic changes as fasting)”), www.webmd.com (article titled “Do Fasting Diets Work?” states “*fasting diets* aren’t all the same. Some allow only liquids like water, juice, or tea. Others *cut calories* drastically, but don’t completely ban food. And on some plans, you fast every other day”), 9/8/2020 Office Action TSDR 2-7.

This wording is commonly used to describe the purpose or use of applicant’s type of goods that are meant to be consumed as part of a fasting diet. The evidence attached to the September 8, 2020 Office Action provides examples of third parties that specialize in providing food or drinks that are consumed during and/or to facilitate the efforts to undertake a fasting diet. See www.amazon.com (sells

“weight loss buddy 3 day intermittent *fasting diet* starter meal kit” includes a “pre-measured, pre-calculated 3-day eating plan delivered right to your door”); www.sunfare.com (provides prepared meals and snacks for intermittent fasting diet plans: “A program that supports the intermittent *fasting* approach to eating”); www.nutritionforlongevity.com (provides an intermittent fasting meal kit and meal plan), www.innotechnutrition.com (sells “*Fasting* Days Tea – Herbal Tea for Intermittent *Fasting* Support,” described as “a tea that can be used for any intermittent *fasting* type of meal plan”), www.missionlifemotion.com (provides food list for intermittent fasting diet plan), www.blog.piquetea.com (blog post titled “Tea and Intermittent *Fasting*: the Perfect Match” discusses drinking tea while fasting: “Spoiler: tea can actually make your *fasting* experience more enjoyable and manageable,” also sells various teas for consumption during a fasting diet), www.hangloose.coffee (blog post titled “The Best Teas for Intermittent *Fasting*” provides suggestions for teas to consume while fasting) TSDR 13-18, 20-22, 35, 30-33, 52-56, 62-64, 72-73.

As stated in applicant’s brief, the goods are meant to be consumed “in a recommended order . . . without the consumption of food products not part of the food program,” 6 TTABVue 21, which indicates that the applicant’s goods are meant to be part of a restricted diet. Therefore, because the term FASTING is commonly used to refer to fasting, or restricted calorie diets and meal plans, foods and drinks consumed during a fasting diet plan, it follows that the term “fasting” also describes a characteristic or use of the applicant’s goods because the goods are meant to be used as part of a fasting, or restricted calorie, diet where the user eats sparingly and abstains from certain foods while eating applicant’s identified goods.

- C. The term “DIET” is descriptive of a characteristic, feature or use of applicant’s goods because the goods are meant to be consumed as part of the applicant’s prescribed diet or meal plan.**

The term “diet” means “to cause to eat and drink sparingly or according to prescribed rules” and “A special course of food to which one restricts oneself, either to lose weight or for medical reasons.”

2/05/2020 Office Action, TSDR 91-92, 95. This word merely describes a feature or characteristic of the applicant’s goods because the goods are meant to be consumed by the user as part of a fasting diet, or while restricting food by eating and drinking sparingly with a special course of food provided by the applicant. This wording is commonly used to describe the purpose or use of applicant’s type of goods that are meant to be consumed as part of a fasting diet. The evidence attached to the February 5, 2020 and September 8, 2020 Office Action provides examples of types of fasting diets, or special course of foods to which one restricts oneself. See, e.g., www.blog.biotrust.com (blog post titled “The Best Supplements If You are on a Restrictive *Diet*” discusses the use of supplements while on a restricted calorie diet), www.healthline.com (article titled “The Beginner’s Guide to the 5:2 *Diet*” discusses an intermittent fasting diet wherein the user restricts caloric intake as part of the diet: “The 5:2 *diet*, also known as The Fast *Diet*, is currently the most popular intermittent fasting diet . . . It’s called the 5:2 *diet* because five days of the week are normal eating days, while the other two restrict calories to 500–600 per day”), www.medicalnewstoday.com (article titled “What to know about the 500-calorie *diet*” discusses a restricted calorie diet and other forms of intermittent fasting diets), 2/05/2020 Office Action, TSDR 55-57, 66; www.medicinenet.com (article titled “Fasting *Diets*” discusses the various types of fasting diets; “Fasting for health and to lose weight is also nothing new, but a new crop of trendy *diets* has brought the practice back into the spotlight. *Diets* like the 5:2 *Diet*, Lemonade *Diet*, and others claim to help people lose weight fast and detoxify the body. There are different types of fasting diets that vary in intensity and duration. There are water-only fasts Intermittent fasting involves fasting for one to two days per week or for 12-14 hours each day. Modified fasts include liquid-only diets (such as before a colonoscopy), caloric restriction (typically 20%-40% less), and ketogenic *diets* (a highfat *diet* that induces the same metabolic changes as fasting)”), www.webmd.com (article titled “Do Fasting *Diets* Work?”

discusses fasting diets), www.amazon.com (sells “weight loss buddy 3 day intermittent *fasting diet* starter meal kit” includes a “pre-measured, pre-calculated 3-day eating plan delivered right to your door”), www.sunfare.com (provides prepared meals and snacks for intermittent fasting diet plans), www.nutritionforlongevity.com (provides an intermittent fasting meal kit and meal plan), www.missionlifemotion.com (provides food list for intermittent fasting diet plan), www.blog.piquetea.com (sells various teas for consumption during a fasting diet), www.hangloose.coffee (provides suggestions for teas to consume while on a fasting diet), 9/08/2020 Office Action TSDR 2, 7, 13-18, 20-22, 35, 30-33, 35, 52-56, 62-64. Therefore, the term “DIET” is merely descriptive of the use, characteristic or feature of the goods because they are meant to be taken by consumers as part of a fasting diet or special course of food. Applicant’s response to the request for information confirms this descriptive meaning. See 6 TTABVUE 21 (the goods are meant to be consumed “in a recommended order . . . without the consumption of food products not part of the food program”).

D. The mark as a whole, 5 DAY FASTING DIET, is descriptive of a characteristic, feature or use of Applicant’s goods.

The combination of the terms in the applied-for mark 5 DAY FASTING DIET does not transcend, obscure, or otherwise alter the merely descriptive commercial impression of each of the elements considered separately. Generally, if the individual components of a mark retain their descriptive meaning in relation to the goods, the combination results in a composite mark that is itself descriptive and not registrable. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1516 (TTAB 2016) (citing *In re Tower Tech, Inc.*, 64 USPQ2d 1314, 1317-18 (TTAB (2002))); TMEP §1209.03(d); see, e.g., *Apollo Med. Extrusion Techs., Inc. v. Med. Extrusion Techs., Inc.*, 123 USPQ2d 1844, 1851 (TTAB 2017) (holding MEDICAL EXTRUSION TECHNOLOGIES merely descriptive of medical extrusion goods produced by employing medical extrusion technologies); *In re Cannon Safe, Inc.*, 116 USPQ2d 1348, 1351 (TTAB 2015)

(holding SMART SERIES merely descriptive of metal gun safes); *In re King Koil Licensing Co.*, 79 USPQ2d 1048, 1052 (TTAB 2006) (holding THE BREATHABLE MATTRESS merely descriptive of beds, mattresses, box springs, and pillows).

Only where the combination of descriptive terms creates a unitary mark with a unique, incongruous, or otherwise nondescriptive meaning in relation to the goods is the combined mark registrable. *See In re Colonial Stores, Inc.*, 394 F.2d 549, 551, 157 USPQ 382, 384 (C.C.P.A. 1968); *In re Positec Grp. Ltd.*, 108 USPQ2d 1161, 1162-63 (TTAB 2013). In this case, both the individual components and the composite result are descriptive of applicant's goods and do not create a unique, incongruous, or nondescriptive meaning in relation to the goods. Specifically, as discussed above, each term in the applied-for mark merely describes the goods. In combination, the mark retains its merely descriptive meaning because it directly advises consumers that the goods are meant to be consumed as part of a five day fasting, or restricted calorie diet, or special course of food, where the user abstains from certain foods. Put another way, applicant's proposed mark describes a feature or attribute of the goods identified in the application because the nutritionally balanced meals, meal replacement drinks, soups and snacks are meant to be consumed as part of a five day restricted diet in which the user proscribes other foods and only consumes the applicant's goods in a specific order. *See Applicant's Brief*, 6 TTABVue 19-21. As a result, the mark 5 DAY FASTING DIET is merely descriptive.

E. Applicant's Arguments

Applicant argues that analyzing each component of the mark is improper. *Applicant's Brief*, 6 TTABVue 7. The examining attorney disagrees. As discussed above, when evaluating the mark, the proper consideration is "the commercial impression of a mark as a whole." *Real Foods*, 128 USPQ2d at 1374. "In considering [a] mark as a whole, [we] 'may not dissect the mark into isolated elements,'

without ‘consider[ing] . . . the entire mark,’” *id.* (quoting *DuoProSS*, 103 USPQ2d at 1757), but we “may weigh the individual components of the mark to determine the overall impression or the descriptiveness of the mark and its various components.” *Id.* (quoting *In re Oppedahl & Larson LLP*, 373 F.3d 1171, 71 USPQ2d 1370, 1372 (Fed. Cir. 2004)). Indeed, as explained above, we are “required to examine the meaning of each component individually, and then determine whether the mark as a whole is merely descriptive.” *DuoProSS*, 103 USPQ2d at 1758. The examining attorney properly evaluated the components of the mark and then the mark as a whole to show its merely descriptive meaning. As a result, this argument is not persuasive.

Applicant argues that because the term “fast” has multiple meanings, it cannot immediately convey a characteristic, feature or use of an applicant’s goods. Applicant’s Brief, 6 TTABVue 9-10. The examining attorney disagrees. Applicant’s contention that “a word or phrase that has more than one definition is incapable of immediately conveying a specific definition because it has multiple meanings” is not consistent with the law. Descriptiveness is considered in relation to the relevant goods. *DuoProSS Meditech Corp.*, 695 F.3d at 1254. “That a term may have other meanings in different contexts is not controlling.” *Robinson v. Hot Grabba Leaf, LLC*, 2019 USPQ2d 149089, at *5 (TTAB 2019) (citing *In re Canine Caviar Pet Foods, Inc.*, 126 USPQ2d 1590, 1598 (TTAB 2018)); TMEP §1209.03(e). “It is well settled that so long as any one of the meanings of a term is descriptive, the term may be considered to be merely descriptive.” *In re Mueller Sports Med., Inc.*, 126 USPQ2d 1584, 1590 (TTAB 2018) (quoting *In re Chopper Indus.*, 222 USPQ 258, 259 (TTAB 1984)). In this case, the applicant’s goods are meant to be part of a restricted diet wherein the consumer eats the applicant’s goods in lieu of other foods. See Applicant’s Brief, 6 TTABVue 20-21. The evidence supports the general consumer’s understanding of fasting diets to include restricting foods and abstaining from some foods as a part of that diet. As a result, the definition cited by the examining attorney shows that this meaning is descriptive in relation to applicant’s goods. As a result, this argument is not persuasive.

Applicant argues that because its goods are for medical use and available after completion of an online medical questionnaire, the mark as a whole cannot be descriptive. Applicant's Brief, 6 TTABVue 7, 12. The examining attorney disagrees. There is nothing in the record to show that applicant's goods must be purchased through, or on the recommendation of, a physician rather than directly from the applicant in some manner. Thus, this language does not affect how the mark will be understood by consumers because "[w]e cannot assume that consumers of Applicant's goods will be aware that its identification is so restricted and the restriction is not controlling of the public perception." *Dolce Vita Footwear*, 2021 USPQ2d 479, at *11. The fact remains that applicant's goods are meant to be used over a period of five days as part of a restricted diet plan. As a result, this argument is not persuasive.

Applicant argues that because several third party registrations exist that use the term FAST, its mark should not be deemed descriptive. Applicant's Brief, 6 TTABVue 13.² The examining attorney disagrees. First, only one of the proffered third party registrations uses the term FASTING (Registration No. 5398689, FASTING STUDIO), and that has a different commercial impression when paired with the distinctive and non-descriptive term STUDIO for the Class 5 goods. Second, the remainder of the registrations use the term FAST in a different context or have a different commercial impression and meaning, such as Registration No. 531318, PROBIOTIC FASTMELT, which has the commercial impression of something that melts fast, or quickly. In contrast, applicant's mark is made up of terms directly descriptive of a characteristic, feature and use of the goods, without any additional distinctive wording to remove it from this descriptive meaning. As a result, this argument is not persuasive.

Applicant argues that the mark is suggestive because it does not provide "any information about the goods" and a "potential consumer will not be able to immediately understand" what the specific goods are. 6 TTABVue 11-12. The examining attorney disagrees, as this is not the proper analysis.

² Applicant originally attached these registrations to its August 5, 2020 Response, TSDR 13-15, 25-47.

“Whether consumers could guess what the product [or service] is from consideration of the mark alone is not the test.” *In re Am. Greetings Corp.*, 226 USPQ 365, 366 (TTAB 1985). The question is not whether someone presented only with the mark could guess what the goods are, but “whether someone who knows what the goods and[/or] services are will understand the mark to convey information about them.” *DuoProSS Meditech Corp.*, 695 F.3d at 1254; *In re Mueller Sports*, 126 USPQ2d at 1587. In this case, the components of the mark combine in a manner and order that would be easily interpreted by persons familiar with the English language and the goods. *See Fat Boys*, 118 USPQ2d at 1516. The mark 5 DAY FASTING DIET would immediately be understood to describe prepared meals and meal replacement drinks, soups and snacks that are used in the course of eating sparingly or abstaining from some goods over a five day period. The evidence supports this common consumer perception and understanding. As a result, this argument is not persuasive.

Applicant argues that any doubt regarding the mark’s descriptiveness should be resolved on applicant’s behalf. *E.g., In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 828 F.2d 1567, 1571 4 USPQ2d 1141, 1144 (Fed. Cir. 1987); *In re Grand Forest Holdings, Inc.*, 78 USPQ2d 1152, 1156 (TTAB 2006). However, in the present case, the evidence of record leaves no doubt that the mark is merely descriptive.

CONCLUSION

For the foregoing reasons, the terms comprising the applicant’s mark merely describe a characteristic, purpose and use of the identified goods. As the applicant’s mark fails to indicate a particular source of the goods and consists only of common terms that others have need to use in the marketplace, the examining attorney respectfully requests that the Board affirm the refusal under Trademark Act §2(e)(1).

Respectfully submitted,

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